

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION AT KANSAS CITY

PEGGY RAY,)
)
Plaintiff,)
)
vs.) Cause No.: 4:07-cv-00673-ODS
)
WERNER CO., NEW WERNER HOLDING)
CO., INC., and W.W. GRAINGER, INC.,)
)
Defendants.)

DEFENDANTS' MOTION IN LIMINE
TO EXCLUDE THE VIDEOTAPE OF STANLEY KISKA

COME NOW defendants, by and through counsel, and for their Motion in Limine to exclude the videotape of Stanley Kiska state as follows:

I. INTRODUCTION

Plaintiff may attempt to introduce into evidence a videotape generated by Stanley Kiska. Such video should be excluded because the video was produced after the close of discovery, after Mr. Kiska was deposed and Mr. Kiska's report was never supplemented with the video. Counsel for defendants did not receive a copy of Mr. Kiska's video until November 5, 2008. Further, the video attempts to show Mr. Kiska's "induced walking test" which the Court has already deemed inadmissible in the case.

II. ARGUMENT

The video fails to support plaintiff's allegation that "very subtle shifting... can cause significant racking and walking to occur." The video shows Mr. Kiska deliberately rocking, moving and walking the ladder, bouncing on the ladder, not facing the ladder and overreaching – all of which plaintiff claims Mr. Ray was not doing. As such, the conditions in Kiska's video are not substantially similar to the events at issue, as alleged by plaintiff. *See McKnight By and Through Ludwig v. Johnson Controls, Inc.*, 36 F.3d 1369, 1401 (8th Cir. (Mo.) 1994). (Experimental evidence may be properly admitted if the tests were conducted under conditions *substantially similar* to the actual conditions.)

Additionally, the video should be disregarded because the Court recently granted defendants' motion to strike Mr. Kiska's testimony as it relates to his "induced walking test" because, by Mr. Kiska's own admission, the test has not been peer-reviewed, utilized by other experts, or accepted in the field. (See Doc. #153) Thus, the induced walking test conveyed in the video is unreliable. A video of an experiment must demonstrate general scientific principles and meet the requirements of *Daubert* to be admitted. Because Mr. Kiska's testing fails to meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), the video should be excluded.

WHEREFORE, defendants respectfully request this Court's Order in limine prohibiting plaintiff from offering into evidence or showing any parts of the Kiska video.

Respectfully submitted,

/s/ Joseph R. Swift

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CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of December, 2008, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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